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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD ROWE, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES D. RHODES
Hartig, Rhodes,
Norman & Mahoney
717 K Street
Anchorage, AK 99501
(907) 274-3576

February 23, 1981

Ken Wray's Print Shop, Inc., 323 East Fireweed, Anchorage, Alaska 99503, 907-276-4535

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QUESTION PRESENTED

Can the United States Government, under federal common law, accept as earned, and then spend and refuse to return, advance rentals tendered for oil and gas leases on public lands, yet have no obligation to issue those leases?

INTERESTED PARTIES

RICHARD ROWE, JACK FRICKE, WALTER SCZUDLO, DENNY BREAID, CHARLES LAFFERTY, ELKAN MORRIS, DAN GUADIANNE, EDWIN SAMAY, NEW STATE FINANCE, INC., FIRST NATIONAL BANK OF FAIRBANKS, Executor of the Estate of Robert Briggs, deceased, DAN RAMRUS, ROBERT J. COLLINS, LEN HANNAMAN, WALTER WIGGER, WINNIFRED WIGGER, PAUL GREIMANN, JR., E. B. JOINER, G. M. ANDERSON, J. B. APPLING, SARADELL ARD, BURTON ARRESTAD, JOSEPH BABINEC, QUINTON CHRISTENSEN, JUANA EDWARDS, G. H. DRUMHELLER, GAYLE FOGELSON, KENNETH GAIN, OTTO GREEN, MATHEW HAMANN, ERNEST HOLM, R. C. KILTZ, FRANCES MACHADO, KENNETH RANKIN, H. G. SCHIFF, W. A. TWEEDY, JAMES VANDERWEELE, RICHARD WARREN, et al., MERRILL WIEN, DOUGLAS MILLARD, W. ZAEGEL, TOM THOMAS, E. G. SCHOOT, W. M. SHEAR, F. ZAWAKI, PAUL GREIMANN, SR., and FLORA GREIMANN.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Richard Rowe, et al., petitioners herein, pray that a writ of certiorari

issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on November 28, 1980.

OPINIONS BELOW

The November 28, 1980 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at Richard Rowe v. United States, 633 F.2d 799 (9th Cir. 1980), and is reprinted in Appendix A hereto, pp. 1-11. The opinion of the United States District Court for the District of Alaska is reported at Richard Rowe v. United States of America, 464 F.Supp. 1060 (D.Alaska 1979) and is reprinted in Appendix A hereto, pp. 12-76.

JURISDICTION

The judgment of the Court of Appeals was entered on November 28, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Mineral Leasing Act, §§ 17(a) and (c), 30 U.S.C. §§ 226(a) and (c):

> (a) All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary.
>
> ....
>
> (c) If the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this chapter shall be entitled to a lease of such lands without competitive bidding.

> Such leases shall be conditioned upon the payment by the lessee of a royalty of 12-1/2 per centum in amount or value of the production removed or sold from the lease.

STATEMENT OF THE CASE

This is a contract action under federal common law brought by numerous individuals seeking to compel the Secretary of the Interior (Secretary) to issue oil and gas leases to them. The lands involved were conveyed from the United States to the Arctic Slope Regional Corporation (ASRC) under the Alaska Native Claims Settlement Act (ANCSA), 83 Stat. 688, 43 U.S.C. § 1601 et seq.

A. The Secretary's Solicitation and Acceptance of Offers to Lease.

The Mineral Leasing Act, 41 Stat. 437, 30 U.S.C. § 181 et seq., authorizes the Secretary to lease without competitive bidding public lands not containing known deposits of oil and gas. On September 23, 1966, the Secretary published a notice soliciting oil and gas lease offers covering the lands involved in this case. 31 Fed. Reg. 12575, App. pp. 99-105. The solicitation stated:

> [T]he lands described therein will become available for noncompetitive oil and gas leasing pursuant to the Mineral Leasing Act of February 25, 1920 . . . The provisions of this notice shall supersede any provisions of the regulations with which they may be in conflict.
>
> ....

> Offers to lease must be submitted on a "Special Oil and Gas Drawing Entry Card", Form 4-1720, signed by the applicant . . . . Only one entry card will be drawn for each leasing block. The entry card must be accompanied by a $10 filing fee and the first year's advance rental for the total area as shown on the appropriate approved leasing map.
>
> ....
>
> Upon the determination of the successful drawee for a particular block, the first year's rental will be earned and deposited in the U.S. Treasury, and will not be returnable.

The Assistant Director of the Bureau of Land Management (BLM) explained the function of the Special Oil and Gas Drawing Entry Card:

> The card has been designed so that the offeror's signature thereon binds him to a lease on Form 4-1158. This system is designed so that the leases can be issued

> immediately upon determination of the successful drawees. This means that the advance rental for these leases can also be deposited immediately to the earned account.

Where more than one person offered to lease the same parcel of land, the Secretary was to reject all offers except the one drawn by lot. On December 20, 1966, seventy-nine offers submitted by Petitioners were drawn by lot. The Secretary at that time accepted as earned the first year rentals then due under the leases, totalling $100,120.00 in checks and money orders tendered by Petitioners, and deposited those earnings in the earned account of the United States Treasury. The Secretary subsequently refused to issue Petitioners their

leases, yet for ten years refused to return the rentals paid because they had been earned.

Prior to the December 20, 1966 drawing, Alaskan natives protested federal leasing of lands to which they asserted aboriginal claims. In response to these protests, the Secretary suspended issuance of leases on affected lands. Shortly before the December 20, 1966 drawing, the Secretary posted notices in the Anchorage and Fairbanks offices of the BLM, and in a Fairbanks newspaper, announcing that the drawing would be held but that issuance of the leases would be postponed pending further consideration of the aboriginal claims. The record does not establish whether any

persons who received this notice failed to withdraw their offer and tender of first year rental fees. Oil was discovered in 1968 at Prudhoe Bay, nearby the lease lands at issue and, in 1976, the BLM transferred these lands, subject to valid existing rights, to ASRC under the Alaska Native Claims Settlement Act, 83 Stat. 688, 43 U.S.C. § 1601 et seq., 1613(g).

B. The Proceedings Below.

Petitioners appealed to the Alaska Native Claims Appeal Board from the BLM's approval of the lease land conveyances to ASRC. In re Arctic Slope/Western, ANCAB #RLS76-11(A)-(M); In re Arctic Slope/Eastern (Central), ANCAB #RLS76-12(A)-(O); App., pp. 77-97. The Secretary assumed direct

original jurisdiction over the appeals, and, on November 24, 1976, upheld the BLM conveyance approval, holding that Petitioners had no contractual rights to the lease lands. Id. The Secretary then attempted to reimburse to Petitioners the $100,120.00 the United States had earned ten years earlier for the first year of tenancy. Petitioners refused the tender of reimbursement and demanded issuance of their leases.

Petitioners challenged the Secretary's actions in the United States District Court for the District of Alaska, invoking the court's jurisdiction under 5 U.S.C. § 554; 5 U.S.C. §§ 701-706; 28 U.S.C. § 1331(a); 28 U.S.C. § 1361; 28 U.S.C. § 2201; 28

U.S.C. § 2202; and 28 U.S.C. § 2409(a). Petitioners sought to compel the Secretary to issue the leases to them, rather than ASRC, and money damages. The District Court granted the United States and ASRC summary judgment under Federal Rule of Civil Procedure 56(b), affirming the Secretary's opinion that Petitioners had no contractual rights to the lease lands. Rowe v. United States, 464 F.Supp. 1060, (D. Alaska 1979); App., pp. 12-76. On appeal, the Ninth Circuit held that the District Court lacked jurisdiction over Petitioners' claims for money damages, but affirmed the District Court's decision on summary judgment that Petitioners failed to establish any contractual right to the leases.

Rowe v. United States, 633 F.2d 799 (9th Cir. 1980); App., pp. 12-76.

REASONS FOR ISSUING THE WRIT

Issuance of a writ of certiorari to review the decision of the Ninth Circuit is necessary to establish certainty and reliability in the sale of oil and gas leases on public lands.

The Secretary has broad power under the Mineral Leasing Act to issue oil and gas leases on public lands not within any known geological structure of a producing oil and gas field Udall v. Tallman, 380 U.S. 1, 4 (1965). The Act gives the Secretary discretion to refuse to issue any lease at all on such lands, requiring only that if such a lease is issued, it must be

issued to the first qualified applicant. Id. The Secretary has broad authority to determine how and when he will exercise his discretion to lease, including the authority to contract to issue oil and gas leases. See, e.g., Burglin v. Morton, 527 F.2d 486 (9th Cir. 1976); McTiernan v. Franklin, 508 F.2d 885 (10th Cir. 1975); Duesing v. Udall, 350 F.2d 750 (D.C. Cir. 1965). However, when the Secretary seeks to enter into a contract to issue an oil and gas lease, his rights and obligations are generally governed by the same rules of contract law that are applied to transactions between private parties. See Redding Steel Casting Co. v. United States, 268 U.S. 186, 188

(1925); United States v. Purcell Envelope Co., 249 U.S. 313, 318 (1919). There comes a point in the contracting process where the Secretary exhausts his discretion and becomes obligated to issue a lease. Superior Oil Co. v. Udall, 409 F.2d 1115, 1121-1122 (D.C. Cir. 1969) (Burger, Judge); see United States v. Purcell Envelope Co., supra, 249 U.S. at 318.

The notice by which the Secretary solicited offers to lease bound Petitioners to pay their first year's rent, $1,280.00 per lease tract, immediately upon determination of the successful offeror on December 20, 1966. Under the terms of the solicitation, the Secretary "earned" those rentals at that time. On December 22,

1966, the Secretary in fact accepted the $101,120.00 in checks tendered by Petitioners as first-year rentals. He later endorsed and cashed those checks, and deposited the proceeds in the earned account of the United States Treasury. Moreover, for the next ten years he refused to return to Petitioners these monies, asserting that he had earned them on December 20, 1966.

The Secretary accepted and treated as earned the $101,120.00 in rent checks tendered by Petitioners with their offers to lease, and he should not be allowed to deny that he accepted those offers. Superior Oil Co. v. Udall, supra, 409 F.2d at 1121-1122; Mitchell v. Simms, 63 S.W.2d 371 (Texas Civ.

App. 1933); see Thomson v. United States, 357 F.2d 683, 689 (Ct. Cl. 1966); Russell v. Texas Co., 238 F.2d 636 (9th Cir. 1956); Acadia, California, Ltd. v. Herbert, 54 Cal.2d 328, 353 P.2d 294, 5 Cal. Rptr. 686 (1960); Warrior Constructors, Inc. v. Small Bus. Inv. Co., 536 S.W.2d 382 (Tex. Civ. App. 1976); Restatement, Second, Contracts § 72(2) (Tent. Draft Nos. 1-7, 1973); 1 Williston, Contracts §§ 90, 91D (rev. ed. 1970); cf. Uniform Commercial Code, § 2-606 (1)(c). The Secretary "earned" the rentals he accepted from Petitioners only if he undertook to render that for which these rentals had been tendered, i.e., the leases. See Cold Metal Process Co. v. Commissioner, 247 F.2d 864, 872

(6th Cir. 1957). If Petitioners became bound on their offers to lease, so that they could not resist enforcement by the Secretary of their obligation to pay the first year's rent, they acquired the right to enforce the obligation of the Secretary to issue the leases. Thus, the point in the lease procurement process at which the Secretary became bound to issue the leases was the same as that at which Petitioners became bound to pay their first year's rent: at the time of the drawing on December 22, 1966.

The decision of the Ninth Circuit in the instant case squarely conflicts with the position of the Court of Appeals for the District of Columbia on the Secretary's acceptance of oil

and gas lease offers. Mr. Chief Justice Burger, while sitting on that Court of Appeals, held that a lesser exercise of dominion by the Secretary over rentals submitted with oil and gas lease offers than that present in the case at bar constituted acceptance of the offers to lease. Superior Oil Co. v. Udall, 409 F.2d 1115 (D.C. Cir. 1969). In Superior, the Secretary endorsed for the account of the United States and deposited for collection a check accompanying Superior Oil Company's offer to lease oil and gas tracts. The proceeds were placed in a "suspense account" pending resolution of irregularities in an offer submitted on the same tracts by Union Oil Company. Checks accompanying all other

offers were returned uncashed to the unsuccessful offerors. District Court Judge Sirica found that the Secretary accepted Superior's offer to lease by endorsing and cashing Superior's check, held the Secretary had a duty to issue the leases to Superior, and directed the Secretary to issue the leases to Superior. The Court of Appeals for the District of Columbia affirmed.

In the case at bar, the Secretary endorsed for the account of the United States and deposited for collection all checks accompanying Petitioners' offers to lease oil and gas tracts. The proceeds were placed not merely on deposit in a "suspense account" of the United States Treasury, as in Superior,

but rather in the earned account of the Treasury. Moreover, the United States spent the collected rental fees. All checks accompanying other offers were returned to unsuccessful offerors. Under the principles applied by Mr. Chief Justice Burger in Superior, the Secretary accepted Petitioners' offers to lease when he endorsed and deposited Petitioners' checks and placed the proceeds thereof into the earned account of the United States Treasury. Therefore, the conveyance of the lands involved to ASRC was subject to Petitioners' valid existing rights to these leases, and the Secretary should be directed to issue the leases to Petitioners.

In Superior, Mr. Chief Justice Burger articulated the special and important policy considerations presented by the case at bar:

> Having in mind the large sums involved, the large public interest in precision and secrecy of bids for the sale of public land leases, and in the careful procedures called for, the bidders and the public have a substantial interest in certainty. This underlies the detailed procedures provided in the regulations. The need for precision, care and certainty is underscored by the fact that the interest at current permissible rates on the funds of Union and Superior which are immobilized during the pendency of this litigation amount to more than $800 per day; thus bidders and the public have an acute economic interest in having bids resolved surely and swiftly.
>
> * * * *
>
> [T]here are other significant considerations which must be

> weighed and which have important implications beyond this particular transaction; they are factors which affect the integrity of the entire governmental program of selling oil leases on public lands and indirectly indeed the whole process of making public contracts by the process of sealed bids.

409 F.2d at 1119-1120.

The decision of the Ninth Circuit in the case at bar renders uncertain the process by which the Government issues oil and gas leases on public lands, calls the integrity of that process into question, and thereby undermines public confidence as well as that of persons dealing with the Government. This Court should take this opportunity to establish certainty and reliability in the sale of oil and gas leases on public lands.

CONCLUSION

WHEREFORE, Petitioners respectfully pray that a writ of certiorari be granted.

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February 23, 1981